

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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 Sameh Mahmoud Mohamed Said, MD ) COURT FILE  
 ) NO. 20-CV-927 (ECT/JFD)  
 )  
 vs. )  
 ) Courtroom 3B  
 Mayo Clinic and Joseph Albert ) Monday, August 2, 2021  
 Dearani, MD ) St. Paul, Minnesota  
 ) 11:00 A.M.  
 -----

**HEARING ON**

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

BEFORE THE HONORABLE ERIC C. TOSTRUD  
UNITED STATES DISTRICT JUDGE

**A P P E A R A N C E S:**

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1 (11:00 a.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 THE COURT: Good morning, everyone. Please be  
5 seated.

6 This is Said versus Mayo Clinic and others, Civil  
7 File Number 20-927. I'll invite counsel to note their  
8 appearances for the record, please, starting with the  
9 plaintiff.

10 MR. SCHAEFER: Thank you, Your Honor. Larry  
11 Schaefer appearing on behalf of the plaintiff, Dr. Sameh  
12 Said. I have Dr. Said with me and I also have Makenzie  
13 Krause, an associate from our office, as well.

14 THE COURT: Good morning.

15 MS. WILSON: Good morning, Your Honor. Kathryn  
16 Mrkonich Wilson for the defendants Mayo Clinic and  
17 Dr. Joseph Dearani, and I have with me today Emily McNee.  
18 She's a colleague from my office.

19 THE COURT: Good morning.

20 All right. I've read everything and here's how  
21 I'd like to handle this today, if we could, to stay on track  
22 and I think be most productive. If you've got an objection  
23 to approaching it this way, please feel free to tell me  
24 that.

25 I think we ought to devote separate attention to

1 some of the counts separately, so together I think we should  
2 deal with Counts I through VI, so those are the race,  
3 religion, national origin discrimination counts under Title  
4 VII and the Minnesota Human Rights Act. I think it makes  
5 sense. I have some questions regarding those counts. I  
6 think it makes sense to devote roughly 20 minutes per side  
7 to those counts.

8 Then let's deal with the Minnesota Whistleblower  
9 Act count and I don't think that that should take very long,  
10 perhaps five minutes per side, and then I'd like to devote  
11 five minutes each per side to the torts. So we've got  
12 tortious interference with future employment, defamation,  
13 invasion of privacy, and conversion.

14 And what we'll do when I say we'll deal with them  
15 separately, I'll start with you, Ms. Mrkonich Wilson, on  
16 each of these and then, Mr. Schaefer, give you an  
17 opportunity to respond and if necessary brief rebuttal. But  
18 if we can try to stay to those time limits, I think it would  
19 be helpful.

20 Does that make sense, or does anybody -- let me  
21 just ask it this way: Does anybody have an objection or  
22 concern with approaching the argument that way?

23 Mr. Schaefer?

24 MR. SCHAEFER: No objection, Your Honor.

25 THE COURT: Okay.

1 MS. WILSON: No objection.

2 THE COURT: All right. Great. If at the end of  
3 that you think that we've missed something or want to get  
4 something additional on the record, I'll give you a few  
5 minutes to do that. I don't mean to shortcut anybody's  
6 ability to do that.

7 All right. Ms. Mrkonich Wilson, I assume you're  
8 doing the argument today, right?

9 MS. WILSON: I am.

10 THE COURT: Okay, just because of where you're  
11 seated. Let's take the discrimination counts first here.

12 MS. WILSON: Thank you, Your Honor.

13 As I noted at the outset, I represent both  
14 defendants, the individual, Dr. Dearani, as well as Mayo  
15 Clinic, and I may refer to them as Mayo throughout. And I  
16 am representing both of them and I'm proud to be  
17 representing them today, because Mayo Clinic feels strongly  
18 about its policies against workplace harassment.

19 And Counts I through VI are specifically tailored  
20 toward Dr. Said's claims of discrimination in connection  
21 with his delayed promotional opportunities and being placed  
22 on an administrative leave of absence at the time of his  
23 last HR investigation, and then finally as to the  
24 termination recommendation. Those I think are the three job  
25 decisions that are being challenged.

1 Dr. Said with respect to each claim cannot state a  
2 *prima facie* case and will rest in large part on the factual  
3 record, which is significant as Your Honor has noted and has  
4 already reviewed.

5 And we'd point out a few highlights. And that is,  
6 it is undisputed that Dr. Said at the time of the decisions  
7 being made here was not meeting the legitimate expectations  
8 of the employer.

9 THE COURT: How, if at all, do I analyze that  
10 issue, that *prima facie* element, versus a legitimate  
11 nondiscriminatory reason for his termination?

12 MS. WILSON: Well, I think it's fair to say it's a  
13 threshold to even get to the fact that we would need to  
14 articulate a legitimate reason and the burden remains at all  
15 times with Dr. Said, so it is -- it remains a threshold  
16 element to not just show that he is in the protected class.

17 THE COURT: I get that. I'm just sort of  
18 wondering how is it different than -- how do I analyze that  
19 problem differently from analyzing, if we got there -- and  
20 I'm not saying we do, but if we do get there -- a legitimate  
21 non-discriminatory reason?

22 MS. WILSON: I think you analyze it similarly. I  
23 think there would be an argument that perhaps it's a  
24 lighter -- there are cases that will say it's perhaps --  
25 more courts will allow the *prima facie* assumption and go

1 further into the analysis, but frequently what we'll see in  
2 the opinions is the court will say there isn't a *prima facie*  
3 case in that he was not meeting his performance expectations  
4 at the time, and furthermore, we will then look at the  
5 pretext arguments as well, and I believe they're analyzed  
6 similarly.

7 So, I'm not arguing that Dr. Said's performance  
8 was sufficient enough to get himself to the pretext, but I  
9 would argue in the alternative that either way his  
10 performance is a legitimate business reason for the actions  
11 taken and it also disqualifies him from even going there.

12 THE COURT: I just didn't see any analytical  
13 distinction between the two, thus the question, other  
14 than -- apart from where they fall in the framework, I  
15 didn't see an analytical distinction between the two.

16 MS. WILSON: Right. And I will agree with you on  
17 that. I think that that is why we do argue this strongly on  
18 the *prima facie* case because it's not being met.

19 This is not a case about Dr. Said's surgical  
20 skills. I think that is not what's at issue, but what is at  
21 issue is his failure to accept a counseling message that was  
22 clearly and loudly given to him in December of 2017. He was  
23 counseled about sexual harassment, about his pursuit of  
24 women in the workplace being offensive and unwelcome, and he  
25 was told to stop. He couldn't. He didn't.

1           So, we move into 2018 when the next complaint  
2           surfaces, and by that time he is clearly in writing on  
3           notice of the need to check his appropriateness and his  
4           unwelcome gestures to women in the workplace, but he does  
5           not stop.

6           And in October of 2018, a physician's assistant  
7           who works with him closely comes forward and, afraid of her  
8           job, afraid of retaliation, lays out for HR in an  
9           investigation more crude, inappropriate, vulgar conduct and  
10          text messages and communications than anyone could believe,  
11          quite frankly. So after having been warned and counseled,  
12          it continued. I don't know why, I'm not a psychologist, but  
13          I am a lawyer, and I know it completely violated the  
14          policies that he had been admonished to follow.

15          So, by the fall of 2018 he is placed on  
16          administrative leave, a deeper investigation ensues, more  
17          information is uncovered, and at this point in time Dr. Said  
18          has been given two opportunities to prolong his advancement.  
19          So, it's like being in a law firm. You know, you're not  
20          going to be elevated to partner this June, but we're going  
21          to kick that decision down the road and give you time to  
22          shape up and we'll reconsider you at that time. You're  
23          going to have a better chance if you can demonstrate a track  
24          record of behavior. And he couldn't. He didn't. So he  
25          gets a couple times where he's told, "We're going to extend

1 your consideration. You're not meeting our expectations."  
2 So, this is a clear case of somebody not meeting  
3 expectations, and notwithstanding the warnings,  
4 notwithstanding the admonitions, he continued to engage in  
5 this conduct.

6 So, we get to the fall of 2018 and the Personnel  
7 Committee makes a recommendation and gives him a five-page  
8 letter that is quite detailed saying: Here are the  
9 conclusions of a very thorough investigation in which Mayo  
10 in good faith concluded that his employment needed to end  
11 and the recommendation was being made to the Termination  
12 Review Committee.

13 Those are all legitimate nondiscriminatory reasons  
14 for the conduct, for the decisions that were made with  
15 respect to his promotions, with respect to his being placed  
16 on leave in the first place, and with respect to the  
17 decision to terminate or to recommend his termination.

18 He had a choice at that point in time. He could  
19 choose to resign, which he did, he quit, but in so doing he  
20 asked -- specifically asked would he be reported to the  
21 Board, could he avoid some form of Board reporting, and the  
22 discussion is, you know, in the record, it's quite clear, he  
23 was told regardless of quitting or being terminated, this  
24 will be reported to the Board. So, he was reported to the  
25 Board. He signed that stipulation in the spring of 2018



1 while he was gainfully employed with the University of  
2 Minnesota, where he continues to work.

3 So, this is a case about -- this is a case where I  
4 think it was Dr. Said was on leave and himself said to the  
5 Personnel Committee chair: Look, I realize I've done some  
6 things wrong. Some of my communications were inappropriate.  
7 I was hoping for a less severe penalty. So, this is a  
8 decisionmaker's choice. This is an employer's prerogative  
9 to enforce its policies and there's nothing unlawful about  
10 that decision.

11 To try to create something where I believe there's  
12 nothing, Dr. Said spends a great deal of time pointing to  
13 somebody that he identifies as a comparator, who is  
14 Dr. Simon Maltais. He's Canadian-born, white. He was also  
15 a Senior Associate Consultant cardiovascular surgeon, as was  
16 Dr. Said.

17 THE COURT: Maltais.

18 MS. WILSON: Maltais.

19 THE COURT: We were wondering how to pronounce  
20 that, so --

21 MS. WILSON: I'm not French, but I think in his  
22 French-Canadian accent we heard Maltais.

23 And so, sure, he was the subject of complaints  
24 made to a hotline and there were numerous complaints, but  
25 the legal analysis is whether or not this is a person

1 similarly situated in all relevant respects, and he was not.  
2 He was not found by Doctors -- it's undisputed that  
3 Dr. Dearani and Dr. Rihal were extensively reviewing  
4 Dr. Said's investigation and the kind of conduct, the  
5 sexually harassing nature of the conduct and the  
6 relationship engendering that he was engaged in, was very  
7 different than the complaints that were received about  
8 Dr. Maltais.

9 So, we can go on and on, but the record is quite  
10 clear and I think one -- I'm sorry. Were you going to ask a  
11 question?

12 THE COURT: Yes. Apart from the one instance in  
13 which Dr. Maltais gets his cell phone out and inappropriate  
14 content is allegedly displayed, is there anything about the  
15 complaints against him that could be construed as sexual  
16 harassment?

17 MS. WILSON: No. I think that Counsel argues that  
18 because it was a woman, that Emily Coldiron is the person  
19 that you'll see referred to several times I think in five or  
20 six of the complaints, it's the same issue being raised  
21 again and again and again.

22 And the testimony around that was that he was  
23 leaving a room, a hospital room, and he -- you know, you can  
24 see in the record there were issues about his -- the way he  
25 talked to people, being abrupt, kind of gruff. And in that

1 instance, whatever happened, he pushed his way out is the  
2 claim and shoved her and somehow hit her in the shoulder.

3 So, they have made much argument about the fact  
4 that that is a physical touching and Dr. Said undisputedly  
5 did not physically sexually assault the women who  
6 complained, and that is an apple and an orange. We're not  
7 talking about the same kind of sexually harassing conduct  
8 and that is what Dr. Dearani was quite adamant about in his  
9 deposition, as was Dr. Rihal.

10 So, I think we have to -- also, it's important to  
11 look at the record and what the record says about those  
12 things. There's a reference made that caught my eyes. I  
13 was reading the briefing -- I don't want to say at what time  
14 last night because I was well-prepared, of course, last week  
15 for this argument.

16 But in looking at it one more time, at page 13 of  
17 Plaintiff's memorandum in opposition to summary judgment  
18 there's a reference to Dr. Maltais and calling him a  
19 comparator, and there's this argument that Dr. Maltais was  
20 given six months of a runway as opposed to being terminated  
21 the way Dr. Said was. Well, right, again, very different  
22 conduct and there was a discussion of this isn't a fit.  
23 They never gave Dr. Maltais extensions of his promotional  
24 consideration. It was: "This is not a fit. You are going  
25 to leave." So his employment at Mayo was definitively

1 ending and he was told that.

2 And one of the arguments Counsel makes is that he  
3 was given some type of glowing references by Dr. Dearani or  
4 Rihal and that helped him in his future. And the specific  
5 quote says: "These positive references were instrumental in  
6 Maltais finding subsequent employment at the University of  
7 Montreal, and later finding another position in the HCA  
8 Healthcare System in California." Then there's a cite to  
9 two deposition pages.

10 And so I went -- I thought that just isn't what I  
11 heard and I went back and sure enough the cite to  
12 Dr. Dearani's deposition is that he doesn't remember if he  
13 gave this specific reference, but that would be -- you know,  
14 it would be consistent that he responded to requests for  
15 references, and Dr. Maltais similarly did not say anything  
16 about whether this is a positive reference that was  
17 instrumental in him finding subsequent employment.

18 So, we have to leave aside argument to counsel and  
19 facts to the record, and I think when you take the facts to  
20 the record it's undisputed that Dr. Maltais is not similarly  
21 situated. And in fact, what we have pointed out and what  
22 came out in the discovery record is that, in fact,  
23 Dr. Dearani had delayed promotional consideration for  
24 Dr. Lyle Joyce, somebody who testified in Dr. Said's favor  
25 and supports his claims. He likewise was sidelined for

1       awhile by Dr. Dearani and not pleased about it. He  
2       ultimately did testify in this case.

3               And the record also reflected that there were two  
4       individuals who were much more similar to the types of  
5       conduct that Dr. Said was investigated for and the subject  
6       of this lawsuit, and both of those individuals, Drs. Grothey  
7       and Sarano -- apologies -- they did not testify in the case,  
8       so they're not as top of mind, but they are two other  
9       individuals who were subject to similar types of complaints,  
10      and this was consistent with Mayo's response and  
11      Dr. Dearani's response and Dr. Rihal's response as the chair  
12      of the Personnel Committee and likewise reported to the  
13      Board.

14             So I think the record is clear in showing that  
15      there isn't a *prima facie* case to support the claims of  
16      discrimination in Counts I, II, III -- let's see. It's  
17      race, religion, national origin discrimination under both  
18      state and federal law.

19             THE COURT: I think I through VI, right?

20             MS. WILSON: That's what I'm just confirming, the  
21      counts. Yes, I through VI.

22             So, I don't want to take more time than we need to  
23      take. If you have a question.

24             THE COURT: Let me wrap up just one fact question  
25      that I should remember and don't.

1           One of the two physicians who Mayo says are more  
2           reasonable comparators, if I can use that word, one retired.  
3           What happened to the other one?

4           MS. WILSON: That was Dr. Grothey. He was accused  
5           of harassment and the PC made a recommendation to terminate  
6           him. He chose to resign and he was reported to the Board,  
7           as was Dr. Said. But Dr. Sarano, the one who retired, was  
8           also reported to the Board.

9           THE COURT: Correct, right. He had to be.

10          MS. WILSON: Right.

11          THE COURT: Okay. So the stipulation that  
12          Dr. Said entered with the Board of Medical Practice, I don't  
13          understand Mayo to be relying on that to suggest that it  
14          establishes in some legal sense, some *per se* legal sense,  
15          the reasonableness of -- the fact that he did not meet your  
16          legitimate expectations; is that fair?

17          MS. WILSON: Well, we aren't relying on it because  
18          we don't need to, right? We reached our good-faith -- after  
19          a good-faith investigation we reached -- Mayo reached  
20          conclusions and acted upon them. So I don't think whether  
21          or not Dr. Said agrees or disagrees with the decisions is  
22          material to Mayo's -- legitimacy of Mayo's decisions, so  
23          it's not -- but I think it's telling --

24          THE COURT: He owns up to some of the conduct,  
25          right?

1 MS. WILSON: Right, right. And he said to  
2 Dr. Rihal, "I wish the penalty were less severe," right. He  
3 admitted to lots of inappropriateness in his texting  
4 messages and communications.

5 The problem is that what came out in the  
6 investigation wasn't just a little bit of something, but if  
7 you read -- I think it's most significant is Chad Johnson  
8 was the lead investigator and to his declaration are  
9 attached things that are grotesque in nature and continuing.

10 And even after she told him, for example, that --  
11 she met with him outside of work in August of 2018 and said,  
12 "This" -- you know, "I'm not interested in a relationship.  
13 I have a relationship." And in September, in that  
14 conversation he says he's -- he expresses suicidal thoughts  
15 and comments, she reports, and then subsequently,  
16 undisputedly, he gives her a video of them in a surgical  
17 procedure where their hands are on a patient's heart that he  
18 set to music. I mean, she is understandably completely  
19 beside herself.

20 So, these are the types of things that were coming  
21 to them, so whether or not he agreed with the conclusion and  
22 he agreed with the recommendation is not material. It is  
23 noteworthy that he did stipulate to the Board.

24 THE COURT: Okay. Thank you.

25 Mr. Schaefer.

1 MR. SCHAEFER: Thank you, Your Honor. I'm just  
2 going to grab a water that's in front of me here.

3 THE COURT: That's great, and then if you could  
4 make sure that that microphone's turned on too.

5 MR. SCHAEFER: I will.

6 THE COURT: Thanks.

7 MR. SCHAEFER: Had to get used to a lot of  
8 technology over the last year and a half.

9 THE COURT: Yes.

10 MR. SCHAEFER: Your Honor, I appreciate the  
11 opportunity to respond and I'll try to do it within the  
12 framework that you mentioned, sort of 20 minutes to reply,  
13 because we have presented in great detail in our memo why  
14 the record that we have cited extensively establishes that  
15 Dr. Said's discrimination claims require trial.

16 THE COURT: Give me the three best pieces of  
17 evidence you've got that show that.

18 MR. SCHAEFER: First, the treatment -- the  
19 inexplicable contrast in the treatment between Dr. Said and  
20 Dr. Maltais.

21 THE COURT: Okay. That's one.

22 MR. SCHAEFER: That standing alone requires trial  
23 and Maltais is similarly situated, and I want to point out  
24 an additional argument why that is the case.

25 Second, there is a violation, a clear violation of



1 company policy that Dearani engaged in throughout Said's  
2 employment, in particular in relation to the most critical  
3 evaluative process that Senior Associate Consultants go  
4 through, and that's the 360 Review, Your Honor.

5 The 360 Review is intended to occur annually,  
6 although there is no requirement that it occur annually, but  
7 it is a tool where everybody chimes in on how a Senior  
8 Associate Consultant is doing on a whole variety of factors.  
9 And it is an absolute requirement for a 360 Review to be  
10 conducted in order to be considered for promotion from SAC  
11 to Consultant. That never happened and the record is  
12 inexplicable of terms of why that never happened.

13 And Dr. Dearani also cannot explain why the  
14 favorable -- extremely favorable review for Dr. Said in  
15 December of 2016, which I believe is Jones Exhibit 38, Your  
16 Honor, why that extremely favorable review was never  
17 provided to Dr. Said until a year and a half later, almost,  
18 till March of 2018.

19 THE COURT: So is that the third piece?

20 MR. SCHAEFER: No, that's the 360 Review.

21 And the third important piece is we have presented  
22 evidence that throughout Said's employment at Mayo,  
23 Dr. Dearani treated him differently, disparaged him. In  
24 fact, he did oppose his hire. He said that he was not Mayo  
25 material and his treatment of Dr. Said throughout his

1 employment reflected that.

2 Now, to argue that Dr. Said has not established a  
3 *prima facie* case in the face of not only that incredibly  
4 favorable 360 Review, but all of his annual reviews, which  
5 were exceptional, and the fact that he met and exceeded and  
6 in fact was the most productive cardiovascular surgeon in  
7 the department is absurd. He has clearly overwhelmingly  
8 established his *prima facie* case. The adverse action  
9 against him that we are attacking is not only the process of  
10 delaying his promotion to SAC -- or to Consultant, excuse  
11 me, Your Honor -- but the recommendation to terminate him  
12 when the treatment of Said was remarkably different.

13 Now, when the Court has before it two  
14 extraordinarily different --

15 THE COURT: Are you suggesting that the  
16 allegations -- that the harassment investigation is  
17 unrelated to the showing of a *prima facie* case?

18 MR. SCHAEFER: I'm sorry, Your Honor. That the  
19 investigation into my client's --

20 THE COURT: Are you suggesting that Mayo's  
21 expectations that its physicians not sexually harass its  
22 employees or others, are you suggesting that that policy and  
23 the investigation into your client and the reason for the  
24 termination is not relevant to the *prima facie* case?

25 MR. SCHAEFER: Absolutely not, Your Honor. All

1 I'm asking is that Dr. Said be treated like others, treated  
2 like other comparable employees in similar circumstances.

3 When the Court is faced with disparate treatment  
4 between two employees, the critical factor for the Court to  
5 determine, particularly in summary judgment, as a matter of  
6 law is whether those two employees are similarly situated.  
7 The parties have devoted a lot of the briefing to that  
8 issue, but it's a simple concept.

9 THE COURT: You disagree on the legal standard  
10 that applies to determining whether someone is or is not  
11 similarly situated.

12 MR. SCHAEFER: I think the briefing is -- we've  
13 all cited many of the same cases. I want to highlight  
14 three, Your Honor, because I think there's no way to apply  
15 the law on similarly situated and conclude that Maltais is  
16 isn't similarly situated, that his treatment is not  
17 something a jury could rely on in finding discrimination,  
18 and at the summary judgment stage, that's the inquiry that  
19 the Court has to focus on, is there evidence that a jury  
20 could rely on that is admissible that could support  
21 discrimination. Maltais' treatment is exactly that.

22 Now, the similarly situated standard, the three  
23 cases that are the most, from our perspective, useful for  
24 the Court in looking into that, is the **Rideout** case, where  
25 the court, among other things, says that you don't have to

1 look for an exact clone, the treatment doesn't have to be  
2 exactly the same, only of comparable seriousness. That's  
3 715 F.3d 1079, and the analysis begins at 1085, Your Honor.

4 The **Lynn vs. Deaconess Medical Center** is discussed  
5 by the **Rideout** court, the Eighth Circuit, extensively.  
6 That's at 160 F.3d 484, 487-489. That's two nurses and  
7 whether they are similarly situated when the offenses  
8 committed were different, clearly different.

9 And then **Burton vs. Arkansas Secretary of State**,  
10 737 F.3d 1219, and the analysis is extensive. It's at  
11 1231-35, and that involves two police officers.

12 What the courts look at is not -- there doesn't  
13 have to be the identical conduct, doesn't have to be the  
14 same conduct. It just has to be a violation of policy of  
15 comparable seriousness.

16 THE COURT: Let me see if I can test this a bit  
17 with some hypotheticals.

18 So, let's say you've got Dr. A who's accused of  
19 sexual harassment and you've got Dr. B who's accused of  
20 being a scalpel thrower. Comparable?

21 MR. SCHAEFER: One accused of sexual harassment,  
22 Your Honor, the other accused of throwing scalpels?

23 THE COURT: Well, displaying an extreme temper in  
24 the operating room.

25 MR. SCHAEFER: Yeah, I would say those are of

1 comparable seriousness, so the obligation of the employer to  
2 treatment both similarly would apply and evidence of  
3 disparate treatment like we have here would be relevant.

4 Your Honor, let me talk about the violations of  
5 policy.

6 THE COURT: What's the best case for that  
7 proposition, because to me they seem different under the  
8 law.

9 MR. SCHAEFER: I would say the **Lynn vs. Deaconess**  
10 **Medical Center** is the case where one nurse was accused of  
11 sleeping on the job, the one who the plaintiff pointed to as  
12 a comparable. The plaintiff was accused of various  
13 unprofessional conduct, not sleeping on the job, but of  
14 conduct that the court ultimately reversed summary judgment  
15 and said no, sleeping on the job's of comparable and maybe  
16 even more seriousness than the plaintiff was accused of.  
17 It's relevant. You got to let trial on the discrimination  
18 case. So, **Lynn vs. Deaconess**, but **Rideout** and **Burton**, all  
19 those cases are very instructive on this issue.

20 Let me talk a little bit, Your Honor, about the  
21 violations at issue here.

22 My client was accused twice of expressing his  
23 feelings of love for women in the workplace, the first by a  
24 doctor named Ashikhmina, an anesthesiologist, in October of  
25 2017.

1           The accusations by Dr. Fritock are nonsensical in  
2           terms of that raising anything relating to sexual  
3           harassment.

4           But Ashikhmina pointed to dated texts over a year  
5           old where Said, Dr. Said, had expressed his love for her.  
6           What wasn't involved in that investigation but should have  
7           been is their entire text communications. These were  
8           incredibly close friends over many years and they both  
9           expressed their love for each other. They both decided  
10          never to pursue a relationship. Ashikhmina had a boyfriend  
11          and got pregnant by that boyfriend. And that was the extent  
12          of Dr. Said's supposed transgressions relating to  
13          Ashikhmina. That's it.

14          Your Honor, the Reid accusation, the PA Reid  
15          accusation, that arose in October of 2018, again is  
16          Dr. Said -- it's indisputably no touching of any kind, no  
17          sexual advances of any kind, physical sexual advances of any  
18          kind, but again, it's Dr. Said expressing his love for Reid  
19          and exploring for a very brief time in October of 2018  
20          whether she might be interested in developing a relationship  
21          with him which was while he was contemplating divorce from  
22          his wife and separated from his wife. It didn't go  
23          anywhere.

24          If you review all the evidence of that complaint,  
25          all of it, under the summary judgment standard where you are

1 to construe inferences in Dr. Said's favor, there's plenty  
2 that a jury could find that Dr. Said understood -- maybe  
3 mistakenly, but understood, had a basis for understanding --  
4 that that expression of love might be reciprocated, it  
5 wasn't, and he never pursued it further than that.

6 And this evidence, supposedly damning evidence, of  
7 this video set to music, look at the evidence of that, Your  
8 Honor, because it's a nothing. It is simply a surgery that  
9 Reid worked with Dr. Said on, that he sent her a video of  
10 and that the music came with -- it was sort of preprogrammed  
11 into the video. And it was an incredibly complex surgery  
12 and he wanted her to have a memento of it, as is his giving  
13 her gifts, no different than the way he treated all of the  
14 people that he worked closely with. Dr. Said is in a  
15 demanding practice. He's doing heart surgery on children.  
16 That's his focus. He gives gifts to the people that he  
17 works with and he acknowledges that in relation to Reid, his  
18 expression of interest to her was a lapse in judgment. He  
19 acknowledges that, Your Honor, and he so stipulated to that  
20 in the Board complaint.

21 Look, however, at the record regarding  
22 Dr. Maltais, who like Dr. Said is a Senior Associate  
23 Consultant, hired a month later, like Dr. Said is subject to  
24 the supervision of Dearani and the Personnel Committee.  
25 Maltais is Christian, Caucasian, and of a different national

1 origin, so differing treatment of him is relevant on all the  
2 discrimination scores. They are in same position, subject  
3 to the same supervision.

4 In contrast to the two complaints about Dr. Said  
5 regarding his -- expressing these feelings towards women in  
6 the workplace, there is a record of over ten serious  
7 complaints raised about Dr. Simon Maltais, and those are all  
8 cited in the record and discussed at our memo at page 6 to 7  
9 and 10 to 12.

10 Those complaints include a very serious complaint  
11 raised on October 24th or 22nd, '16 by Drs. David Joyce and  
12 Lyle Joyce in which Maltais' clinical care problems,  
13 Dearani's inexplicable favoritism, had caused 14 physicians  
14 to leave the CVSD, the surgery department, 13 of whom were  
15 minorities.

16 The other complaints that arose in 2017 and 2018  
17 all talk to a pattern of behavior by Maltais, for over a  
18 year, Your Honor, where he is directing abusive conduct  
19 toward women in the workplace, including an assault of one  
20 of the nurses, Emily Coldiron, and that his conduct over  
21 that period of time, in addition to what Your Honor cited as  
22 his -- the pornography on his phone that was apparent to a  
23 subordinate in the workplace. This caused -- this pattern  
24 of conduct caused two individuals to leave, Coldiron and  
25 Julie Holst, a nurse supervisor. And you will see as you



1 review the record that in every instance these hotline  
2 complaints basically say: Referred to the human resources  
3 department for further investigation and counseling.  
4 Nothing was ever done.

5 Maltais testified that throughout his entire  
6 tenure he had a grand total of one meeting with human  
7 resources. Maltais, contrary to Said, received a 360 Review  
8 to facilitate his promotion to Consultant in the summer of  
9 2018. That review was not surprisingly uniformly negative.  
10 And that led Mayo and Dearani with Rihal's approval to go to  
11 Said -- or go to -- excuse me -- Maltais and say, "You're  
12 never going to be promoted to Consultant. This isn't a good  
13 fit. We're going to give you six months of continued  
14 employment. We're not going to report you to anywhere.  
15 We're going to let you resign." And they gave him  
16 references to jobs that he subsequently found. This all  
17 occurred within two months, Your Honor, of the  
18 recommendation -- two to three months of the recommendation  
19 to summarily terminate my client.

20 That disparate treatment and the impact of that,  
21 the impact of -- all Said was asking for through counsel and  
22 through himself is just to be permitted that same kind of  
23 treatment. "Just give me six months. I'll find something  
24 else. Just don't" -- you know, that is exactly what he was  
25 looking for. And that disparate treatment, the jury could

1 readily find, readily find, sounds in discrimination, Your  
2 Honor, and could predicate liability on the discrimination  
3 counts on that evidence alone.

4 THE COURT: Let me ask you the same question I  
5 asked your colleague.

6 The legal-standards analysis that would apply to  
7 analyzing whether Dr. Said met Mayo's legitimate  
8 expectations as part of a *prima facie* case, how is that  
9 different under the law -- not factually, under the law --  
10 from analyzing whether Mayo had a legitimate reason for  
11 taking the adverse actions it did?

12 MR. SCHAEFER: Well, Your Honor, the legitimate  
13 reason is -- we have the burden of proving that it's  
14 pretextual if we've established our *prima facie* case, and  
15 Mayo's reason for recommending termination of Said was, is,  
16 has been, that he committed these violations of policy.

17 The *prima facie* case is not an onerous standard at  
18 all, Your Honor, and if a plaintiff demonstrates that work  
19 performance met expectations, which Said's unquestionably  
20 did throughout his tenure as exhibited by not only the one  
21 360 Review he got, but all the other reviews he's got as  
22 well, to say that because he was accused of expressing his  
23 feelings towards two women in the workplace -- they call it  
24 harassment, we -- you know, the disparity in how those were  
25 investigated between Maltais versus Said is just striking,

1 Your Honor. But to say that that renders him not able to  
2 prove a *prima facie* case would mean that anyone coming  
3 before this Court, anyone coming before any court attempting  
4 to prove discrimination who was accused of something in the  
5 workplace couldn't meet a *prima facie* case. The devil is in  
6 the details and the rubber hits the road, Your Honor, when  
7 you look at how the violations of policy were handled  
8 between Said and Maltais, and the disparity couldn't be more  
9 great, and we would submit that they are clearly,  
10 particularly at the summary judgment stage, similarly  
11 situated for the purpose of that evidence, giving a jury a  
12 basis to find discrimination.

13 You also mentioned, Your Honor, that you want to  
14 talk about the MWA claim. I assume that also includes the  
15 reprisal claim, which is Count VII. There's two retaliation  
16 claims, reprisal under MHRA and then the Minnesota  
17 Whistleblower Protection Act.

18 THE COURT: I was less interested in hearing about  
19 the reprisal claim today. I think I understand that. I'm  
20 certainly willing to hear anything you think I need to know  
21 about that that's not in the briefs, but I was thinking more  
22 importantly about the Whistleblower Act claim and I just  
23 want to be sure I understand that claim.

24 MR. SCHAEFER: No, and, Your Honor, the format you  
25 had suggested was five minutes for --

1 THE COURT: But I'm going to start with you on  
2 that one.

3 MR. SCHAEFER: Okay.

4 THE COURT: Give me the nutshell version of the  
5 Whistleblower Act claim.

6 MR. SCHAEFER: Dr. Said suffered an accident on  
7 October 21st, 2017.

8 THE COURT: Let me -- maybe I should ask it just  
9 this way: Is it just related to the HIPAA issue?

10 MR. SCHAEFER: No.

11 THE COURT: Okay.

12 MR. SCHAEFER: No. Your Honor, there's two HIPAA  
13 complaints, one that occurred shortly after October 21st  
14 where Dr. Said through his secretary had complained about  
15 Dearani's violation of HIPAA by contacting a surgeon and  
16 getting patient information regarding Said that he needed a  
17 release to get, and Said complained about that and Dearani  
18 erupted at him.

19 And the second was I believe it's April 3rd of  
20 2018 where Dr. Said, in the midst of just begging Dearani  
21 and Rihal to let him be considered for the promotion that he  
22 had felt he had earned by that time, mentioned to Rihal very  
23 clearly, complained to Rihal on October 8th, that:  
24 Everything has gone south for me since I raised this  
25 complaint to Said about his HIPAA violation, and there was

1 further retaliation against Said after that.

2 There is no explanation, Your Honor, for why  
3 Said -- why no 360 Review was conducted for Said in 2018.  
4 In fact, there's exhibits in the record, in fact that  
5 coaching memo that they point to most prominently. The  
6 coaching memo was basically Dearani telling Said: We're  
7 going to delay your promotion for three months to allow you  
8 to get better, you know, a 360 evaluation for your  
9 consideration for promotion. Never happened after that,  
10 never happened at all in the next nine, ten months while he  
11 was there, 11 months while he was there.

12 And in fact, there's a document in August of 2018  
13 which says that Said is to be issued a final written warning  
14 and given this long-awaited, much sort of requested 360  
15 Review for his promotion to Consultant. It never happened.

16 THE COURT: Okay.

17 MR. SCHAEFER: And finally, Your Honor, within six  
18 days after he was placed on leave for this investigation to  
19 ensue relating to his conduct toward PA Reid, I raised on  
20 his behalf and said, "I'm raising this on Dr. Said's behalf  
21 because he wasn't permitted to communicate with anyone at  
22 Mayo." I said, "This is discriminatory, what my client is  
23 being subjected to," and specifically raised with them the  
24 treatment of Maltais in correspondence throughout that time.  
25 That's another protected report for which retaliation cannot

1 occur.

2 THE COURT: So the question I asked at the start,  
3 Mr. Schaefer, was whether the Whistleblower Act claim  
4 related just to the HIPAA violations, and I think you said  
5 no, but then what I heard you talking about were two  
6 separate instances where the HIPAA violation was at the  
7 center of it.

8 MR. SCHAEFER: There's two, yeah, and I'm happy to  
9 clarify, Your Honor.

10 THE COURT: But it's the one HIPAA violation,  
11 right?

12 MR. SCHAEFER: Right, right. There was one HIPAA  
13 violation that Dr. Said complained of twice and then through  
14 counsel on October 15th, Your Honor, and there's a number of  
15 correspondence where this is fleshed out where the differing  
16 treatment between Said and Maltais is raised.

17 THE COURT: And those are the letters from you.

18 MR. SCHAEFER: That's right.

19 THE COURT: Right. Okay.

20 Ms. Mrkonich Wilson, let me hear from you on the  
21 Whistleblower Act claim.

22 MS. WILSON: (Microphone muted).

23 THE COURT: Oh, microphone. Sorry. You're on  
24 mute.

25 MS. WILSON: Right? The line of 2020, right?

1           Your Honor, as to Count VIII, the Whistleblower  
2     Act claim, as I hear it, Dr. Said's complaint is that  
3     related to Dr. Dearani's conversation with his hand surgeon.

4           And it's undisputed that on October 20th, Dr. Said  
5     had a meeting with Renee Jones and was counseled regarding  
6     the conduct that had been investigated as raised by the  
7     anesthesiologists Drs. Fritock and Ashikhmina.

8           And then the next day he's in a car accident.  
9     There's an email in the record -- I think it's at Jones  
10    Exhibit 36 -- that shows by October 27th the decision had  
11    been made to give him a coaching memo.

12          His surgery then happens. The conversation  
13    happens after the coaching has happened and the  
14    documentation has been decided upon. It's not delivered  
15    until he returns to work after he's recovered from his  
16    injury. So the idea that there was even timing on that  
17    first element.

18          The second issue I'm not -- this issue that he's  
19    saying he reiterated a concern with Dr. Rihal, it's  
20    undisputed that in December of 2017 he was told about the  
21    promotion being extended. He's now saying that there was  
22    something retaliatory about it being extended to Christmas  
23    of 2018 because of the HIPAA concerns he allegedly raised,  
24    and I think we have both the issue of timing on the first  
25    one and then there is no causation and there is no pretext.

1 This is just the carrying out of decisions that were made  
2 based upon conduct that was investigated before he had a car  
3 accident, conduct that he engaged in before he had a car  
4 accident as well.

5 And I don't think -- any other claim that is  
6 raised under the Human Rights Act for a reprisal theory  
7 would be preempted and could not be brought under the  
8 Minnesota Whistleblower Act as well, by the Minnesota  
9 Supreme Court ruling some 20 years ago in **Williams vs.**  
10 **St. Paul Ramsey Medical Center**, so it would be limited to  
11 the alleged HIPAA complaint.

12 THE COURT: Okay. Let me stay with you,  
13 Ms. Mrkonich Wilson. Let's go to the common-law tort claims  
14 here.

15 Tortious interference. Let's start with that and  
16 we're just going to sort of bounce back and forth on each of  
17 these, if that's all right.

18 MS. WILSON: Right. Yes, Your Honor.

19 As to all of the remainder of the briefing, I  
20 think it's important to note and we've cited to the **Horner**  
21 decision out of the -- that was an unreported decision from  
22 the late Judge Kyle, but really got to the point of saying  
23 it's plaintiff's obligation to designate specific facts with  
24 record citations. And I just note that in the briefing we  
25 fall off there, or Plaintiff falls off there, from this



1 Count IX, X, XI, and XII. There isn't record citation to  
2 support or respond to the specific facts and arguments set  
3 forth in our moving papers, and so I think that's a  
4 fundamental flaw in the briefing as to the -- so there  
5 aren't record cites for me to respond to from that briefing  
6 because they're not there.

7 When I look at the tortious interference claim, I  
8 see an interference with -- I think with the ability to be  
9 reemployed, that's sort of the first component. He's got a  
10 two-part claim. And here, the chair of the University of  
11 Minnesota denies the allegations, so you can't create a  
12 genuine issue of material fact out of thin air. There is no  
13 admissible evidence to support the notion that his  
14 reemployment was in any way delayed or affected by Mayo.  
15 The declaration in the record supports the notion that when  
16 he was hired the University of Minnesota envisioned a  
17 three-month onboarding process.

18 The second component to the tortious interference  
19 claim is I believe the report to the Board, and again,  
20 there, in addition to there being civil immunity for such  
21 reporting, that there is also an authorization and release  
22 that Dr. Said executed. So, there's no intent to interfere.  
23 No tortious interference has been established under any of  
24 the elements of the claim.

25 THE COURT: I'm not sure this is the best time to

1 ask this question, but it's something I'm curious about.

2 We have a declaration from Dr. Said that's been  
3 submitted in connection with this motion, correct?

4 MS. WILSON: That Dr. Said submitted a  
5 declaration?

6 THE COURT: Yes.

7 MS. WILSON: Yes.

8 THE COURT: Okay. Any conflict between anything  
9 in that declaration and his testimony in his deposition?

10 MS. WILSON: I think it was more of an elaboration  
11 and I think it was more hearsay and argumentative and I  
12 think the facts in the record are there. We'll accept it  
13 for what it is. So, we didn't make it the subject of motion  
14 practice for the purpose of saying -- there is this piece.  
15 I mean, he quit, I should add, as well, which also takes  
16 away from his ability to bring a tortious interference  
17 claim, but he kind of wants it both ways.

18 On the one hand he says yes -- he first is  
19 addressed about his conduct and the claims in October of  
20 2017 and says, you know, no, it didn't happen -- October  
21 2018, I apologize -- with Rebecca Reid. And he says no, it  
22 wasn't like that, but then when he -- that there wasn't a  
23 journal. He's asked about a journal that he had told her  
24 about. No, there's no journal. Then he comes in a month  
25 later and he says, oh, it was. This is all just -- you

1 know, I think I just heard Counsel say he was expressing  
2 feelings of love, and if that's expressing feelings of love,  
3 that's not welcome in the Mayo Clinic workplace, because  
4 that's a really different way to express feelings of love  
5 when you've been told not to. So that happens. I think his  
6 declaration is consistent with that where we get a story and  
7 then we take another angle.

8 And I think this is a kitchen-sink lawsuit.  
9 That's what I think when I'm getting to Count XII. And we  
10 can have 32 counts, but there's not a count that survives.  
11 There's just not a case. I like being on this side of  
12 this -- if these facts were going to be in court, this is  
13 the side I want to be on.

14 So, that's the tortious interference claim. I  
15 don't know if you want me to stop now.

16 THE COURT: Yeah, let's ping-pong here on this if  
17 we could.

18 MS. WILSON: Okay.

19 THE COURT: Mr. Schaefer, let me hear from you on  
20 tortious interference.

21 MR. SCHAEFER: Two bases for -- not what she  
22 described. First is the delay in the hire --

23 THE COURT: Get a little closer to your  
24 microphone.

25 MR. SCHAEFER: I'm sorry, Your Honor.

1 First is the delay in the hire to the University  
2 of Minnesota position. There was a clear plan that we've  
3 laid out in the record that Dr. Said also testified to for  
4 him to begin on an emergency-privilege basis at the  
5 University of Minnesota Physicians in December of 2018 that  
6 all got derailed because of communications that Dearani had  
7 with Griselli that alerted the University of Minnesota to  
8 the November 19th or -- I think it's 19th -- 2018  
9 termination recommendation letter, and the consequences of  
10 that delayed Dr. Said's start at the University of Minnesota  
11 until about April of 2019, Your Honor.

12 And then second is the University of Detroit  
13 opportunity where both -- where Dr. Zeyer was clear at his  
14 deposition testimony that when he asked Said about Dr. -- or  
15 asked Dr. Dearani about Dr. Said, Dr. Dearani told him --  
16 and I quote -- "I can't talk about him. He's suing me."  
17 And then Dr. Walters also had similar testimony in support  
18 of that, so that there was a tortious interference with that  
19 opportunity as well.

20 Those are the bases for that claim, Your Honor.  
21 It has nothing to do with the Board report.

22 THE COURT: What do I do with the UMPhysicians  
23 affidavit, or testimony, I guess --

24 MR. SCHAEFER: I think that was from  
25 Ikramuddin that said that he had had no communications that

1 he could recall with Dearani. It was Griselli that the  
2 communications were with. Dearani admitted in his  
3 deposition -- I don't know why he would communicate with  
4 Griselli, but he claimed his communication with Griselli was  
5 only after Said started working at the University of  
6 Minnesota. I don't think that's accurate at all, because  
7 Dr. Said was told by Griselli and Ikramuddin that we can't  
8 give you emergency privileges until we get to the bottom of  
9 this November 19th, 2017 letter.

10 So that's that interference, Your Honor.

11 THE COURT: Let's leave defamation for last here.  
12 Let's go to invasion of privacy next, which as I understand  
13 it is the journal.

14 Ms. Mrkonich Wilson, let me hear from you on that.  
15 And if it goes beyond the journal, I guess I need to be  
16 reminded of that too.

17 MS. WILSON: I just -- I will move on to that. I  
18 would just close on the tortious interference with contract  
19 claim. I just heard reference to testimony from  
20 Dr. Walters. There was no testimony from Dr. Walters, so  
21 that didn't happen. And the Detroit testimony, the record  
22 will reflect what it reflects. We've cited to the  
23 testimony.

24 THE COURT: I thought it was just in Dr. Said's  
25 declaration.

1 MS. WILSON: Okay. That's hearsay, right. So do  
2 we have an objection to relying on -- yes, hearsay?

3 THE COURT: That's sort of why I'm saving  
4 defamation for last.

5 MS. WILSON: Right. Thank you.

6 And as for the privacy claims, as I see those,  
7 again, not trying to state his claims for him, but trying to  
8 see what I've understood from the briefing.

9 He's got the publication. I guess the first one  
10 would be intrusion on seclusion. For that he has to show an  
11 intentional intrusion that's highly offensive and in some  
12 matter in which a person has a legitimate expectation of  
13 privacy. And this really was rooted in a case against  
14 Walmart where there were nude photos circulated and it's  
15 become kind of a -- that's the seminal case on the issue in  
16 Minnesota. This is very different.

17 Here, Dr. Said claims his privacy was invaded by  
18 publicizing private facts by the fact that the Mayo  
19 investigators acquired his journal. He testified and  
20 admitted that he doesn't believe it was shared with anyone  
21 inappropriately. Those pages of his deposition are cited  
22 to. He has no record cites in response in his brief. And  
23 the argument made there is, of course, what we reiterate  
24 here, is that acquiring the journal from Mayo's property  
25 when he had told Rebecca Reid it was there in his desk and

1 and she should look at it was perfectly reasonable for the  
2 investigators to do, especially then when he denied the  
3 journal's existence. I mean, the journal was a relevant  
4 piece to their investigation. It was not highly offensive  
5 in the investigative context. It was kept on Mayo's  
6 property, so there isn't a legitimate expectation of  
7 privacy. It wasn't -- unlike the photos that were published  
8 where people were informed that one or more copies had been  
9 circulated in the community, I believe.

10 So, the intrusion on seclusion theory fails as  
11 does, I think -- the second effort is the publication of  
12 private facts and for that he must establish that there's  
13 public disclosure of facts concerning his private life, the  
14 matter disclosed would be highly offensive and objectionable  
15 to a reasonable person, disclosure was intentional, and the  
16 matter publicized is not of legitimate concern to the  
17 public.

18 So, publicity is different than publication, it's  
19 not a privacy invasion for communication of a fact to a  
20 person, and we have cited to some case law in Minnesota that  
21 supports our argument, but again, our arguments in  
22 opposition to the claim are this was not a journal that was  
23 reviewed and then disclosed in any way to the public, it  
24 wasn't published, it was highly relevant to the  
25 investigation. He ultimately brought it to the

1 investigators when he came to his interview on  
2 November 2nd or 2018, so it wasn't reasonably likely to  
3 become public for the way it was used in the kind of  
4 privileged investigative context it was used, so there isn't  
5 a privacy claim.

6 THE COURT: Mr. Schaefer?

7 MR. SCHAEFER: Your Honor, I have little to add  
8 beyond what we have in our briefing. I mean, the journal  
9 was intensely private and was kept in his desk in the  
10 workplace and that was violated.

11 That's all I have to add on that, Your Honor.

12 THE COURT: All right. How about conversion?

13 Mr. Schaefer, let me stay with you on conversion.  
14 I have a question for you on conversion.

15 In the complaint there are two subjects of the  
16 conversion claim, Dr. Said's property rights in this  
17 published article and then also items stored on an H drive  
18 in a notebook. The H drive and notebook don't get any  
19 attention in the briefing and I'm wondering if that's  
20 deliberate. In other words, are those aspects of this  
21 claim, have those dropped out?

22 MR. SCHAEFER: Your Honor, I think they have and I  
23 think the focus is on the article that Dr. Said drafted and  
24 then was cropped out of and it was published following his  
25 termination without any attribution whatsoever to him.



1 THE COURT: Was anyone else attributed?

2 MR. SCHAEFER: I believe there was attribution to  
3 an author in the publication of it.

4 THE COURT: Okay. Ms. Mrkonich Wilson, let me  
5 turn to you on that one just to give you an opportunity to  
6 rebut.

7 MS. WILSON: Well, conversion is willful  
8 interference with the personal property of another without  
9 lawful justification, and here I think the claim that  
10 Dr. Said was removed as a co-author of an article that was  
11 published in an internal Mayo cardiovascular update  
12 publication reflects a claim where there is not a property  
13 interest. He doesn't have a property interest in his name  
14 on a newsletter that he helped draft when he was employed,  
15 was publicized after he resigned and intended to advertise  
16 and promote the practice that he had left. There are  
17 photographs near the article. There is no one identified as  
18 an author on the article, just some pictures.

19 Then he also -- I think we've pointed out and  
20 cited to our brief and attached -- he signed an intellectual  
21 property -- to the extent there even were, he had signed an  
22 intellectual property agreement at the time that he began  
23 his employment, so there couldn't be conversion for various  
24 reasons, all outlined in the brief.

25 THE COURT: Let's get to defamation now. I think

1 I've worked through everything.

2 Ms. Mrkonich Wilson, if you want to sort of  
3 summarize. I think what you're doing is you're sort of  
4 grouping each of these alleged false statements into  
5 different categories and sort of knocking them out for one  
6 wholesale reason or another. I understand that.

7 Anything beyond the briefing that I need to know  
8 there?

9 MS. WILSON: I don't think so. In getting ready  
10 for this argument, I had so many lists of reasons and things  
11 and trying to kind of summarize them. I don't need to argue  
12 their case for them, but there are tons of after-the-fact  
13 claims being made. Every day we were getting -- a new  
14 statement was being called defamatory.

15 And I think it is worth noting that the **Sherr**  
16 decision that we cited in our briefing was just recently,  
17 you know, affirmed by the Sixth Circuit on -- I mean the  
18 Eighth Circuit, pardon me -- on June 2nd, and a recent  
19 request for reconsideration review was denied on I think  
20 July 15th. So that's good law in the Eighth Circuit and I  
21 would rely on the **Sherr** decision to say we've got to look  
22 first at the statements that are pleaded in the complaint.  
23 Those are the statements at issue. And then, yes, we've set  
24 forth the reasons that the claims fail.

25 THE COURT: Okay. Mr. Schaefer?

1 MR. SCHAEFER: Your Honor, we've previously  
2 presented the case law that we think applies and should  
3 apply to determining whether statements at issue are capable  
4 of a defamatory meaning and therefore should be submitted to  
5 a jury to determine whether or not they are in fact  
6 defamatory and imply false facts, so we've laid that out.  
7 We haven't -- I mean, space didn't permit in the briefing  
8 for us to go through statement by statement.

9 But to address the **Sherr** issue and the decision  
10 related to **Sherr**, what we did in the complaint is we alleged  
11 the defamatory statements that we were aware of that we  
12 alleged Dearani and Stulak had been involved in. We have  
13 supplemented that through discovery with some additional  
14 statements, such as Dearani declaring Dr. Said to be a  
15 predator when he became aware of PA Reid's accusation. We  
16 think that's a defamatory statement that should survive  
17 summary judgment and clearly implies false facts about him.

18 We think the statements even to Dr. Zeyer and  
19 others imply very serious negative factual implications  
20 about Dr. Dearani that a jury ought to be able to consider  
21 whether or not those in fact were false and permit a  
22 recovery to Dr. Said on defamation.

23 THE COURT: At the start of this I think I  
24 indicated -- if I didn't, I should have -- that I'd give  
25 both of you an opportunity to get anything else on the

1 record that my questions or the format of the argument here  
2 today didn't permit you to get on, so let me give you that  
3 opportunity at this point.

4 Ms. Mrkonich Wilson, anything from you?

5 MS. WILSON: Well, I would just go back to the  
6 fact that the decisionmakers here and the alleged bad actors  
7 in Dr. Said's world are Dr. Rihal and Dr. Dearani, and they  
8 both stand by their decision, the knowledge that they had  
9 and the assessment that they made of the complaints received  
10 regarding Dr. Said were severe and had consequences.

11 And I think it's noteworthy to point out that in  
12 Mr. Said's own declaration, he says -- at paragraphs 38 and  
13 39:

14 "I also accepted the reprimand associated with  
15 this because I have learned with the S & O" -- the  
16 stipulation and order -- "since the events at Mayo that my  
17 expression of my love for PA Reid and interest in developing  
18 more than a professional relationship, however brief it was,  
19 was a serious lapse in judgment for which I bear  
20 responsibility."

21 He goes on to say he would have gladly accepted a  
22 reprimand. And here the decision is distinctly in Mayo's  
23 hands and Mayo made a decision that we stand by and it has  
24 not been shown in any way to be anything other than a  
25 legitimate and appropriate decision under the circumstances.

1           So, we believe the case should be dismissed on all  
2           counts, however many of them there are, and however many  
3           statements of defamation are alleged. There was a deadline.  
4           Plaintiff sought to move the punitive damages deadline to  
5           amend the pleadings and did obtain an extension, a deadline  
6           was extended, and we've never seen an amended complaint to  
7           match the pleadings, and I do believe the **Sherr** decision is  
8           governing here and those claims should not be considered.

9           Thank you.

10          THE COURT: Thank you. Mr. Schaefer, anything  
11          further?

12          MR. SCHAEFER: Just to close, Your Honor, all  
13          Dr. Said is asking and will ask a jury, if permitted to try  
14          the discrimination and reprisal and other claims, is to be  
15          treated in a manner that is consistent with what the law  
16          requires, and that is individuals are treated similarly and  
17          that there isn't favorable treatment for a protected  
18          class -- or, you know, for nonprotected class physicians  
19          like there clearly was here for Dr. Said, or for --  
20          Dr. Maltais was treated far more favorably. All he asks is  
21          that Mayo be held to the standard that they apply equal  
22          employment opportunity under the law, treat like infractions  
23          similarly or at least ones of comparable seriousness  
24          similarly. They utterly failed to do that here and that's  
25          actionable and that could -- it doesn't demand that a jury

1 find liability, but it could support liability and that's  
2 why trial is required.

3 THE COURT: Thank you.

4 All right. Well, as I said, I've read everything.  
5 The briefing and argument today are helpful in trying to  
6 understand everything that's going on and the work that we  
7 have to do to issue a decision on this motion.

8 We will take the matter under advisement. We will  
9 get a decision out as quickly as we can, recognizing the  
10 importance of a speedy decision to all concerned here.

11 So, thank you very much. We're adjourned.

12 MR. SCHAEFER: Thank you, Your Honor.

13 MS. WILSON: Thank you.

14 (Proceedings concluded at 12:06 p.m.)

15 \* \* \* \*

**C E R T I F I C A T E**

I, **TIMOTHY J. WILLETTE**, Official Court Reporter  
for the United States District Court, do hereby  
certify that the foregoing pages are a true and  
accurate transcription of my shorthand notes,  
taken in the aforementioned matter, to the best  
of my skill and ability.

*/s/ Timothy J. Willette*

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